A

Chan Kok Poh v Public Prosecutor

B HIGH COURT (MUAR) — CRIMINAL APPEAL NO JB-42(ORS)-3–02 OF 2021
AWANG ARMADAJAYA JC
21 DECEMBER 2021

C *Constitutional Law — Collateral challenges in subordinate court proceedings — Reference of constitutional questions to High Court — Appellant filed application to refer constitutional questions to High Court pursuant to s 30 of Courts of Judicature Act 1964 — Sessions court rejected appellant's application — Whether s 18 of Sexual Offences Against Children Act 2017 ('the Act') empowered trial judge to convict accused based on uncorroborated evidence of child which was contrary to arts 5 and 8 of the Federal Constitution and s 133A of the Evidence Act 1950 — Whether s 18 of the Act had relieved public prosecutor of burden of proving criminal prosecution under s 173(m) of Criminal Procedure Code — Whether sessions court may refuse to refer questions concerning constitutional issues to High Court — Whether High Court may decide on any matter of constitutional concern — Whether it was mandatory to refer questions of constitutional matter to Federal Court — Whether questions raised were concerning constitutional matter — Child Act 2001 s 2 — Courts of Judicature Act 1964 s 30 — Criminal Procedure Code s 173(m) — Evidence Act 1950 ss 101 & 133A — Federal Constitution arts 5 & 8 — Sexual Offences Against Children Act 2017 ss 14(a) & 18*

There were three charges under s 14(a) of the Sexual Offences Against Children Act 2017 ('the Act') against the appellant at the sessions court ('the SC') whereby the sessions court judge ('the SCJ') found that prima facie case was proven against the appellant. The appellant then filed an application to refer three questions ('the three questions') to the High Court pursuant to s 30 of the Courts of Judicature Act 1964. The three questions were: (a) whether s 18 of the Act empowered a trial judge to convict an accused person based on uncorroborated evidence of a child which was contrary to arts 5 and 8 of the Federal Constitution ('the Constitution') ('the first question'); (b) whether s 18 of the Act empowered a trial judge to convict an accused person based on uncorroborated evidence of a child which was contrary to s 133A of the Evidence Act 1950 ('the EA') ('the second question'); and (c) whether s 18 of the Act empowered a trial judge to convict an accused person based on uncorroborated evidence of a child and therefore had relieved the public prosecutor of the burden of proving a criminal prosecution under s 173(m) of the Criminal Procedure Code ('the CPC') ('the third question'). At the end of the case, the SCJ dismissed the application and held that the SC had the

jurisdiction to determine question that arose as to the effect of the provision of the Constitution referred by the defence during the course of the trial of the appellant. In the present appeals, the issues to be determined were: (i) whether the SC may refuse to refer questions concerning constitutional issues to the High Court; (ii) whether the High Court may decide on any matter of constitutional concern; (iii) whether it was mandatory to refer questions of constitutional matter to the Federal Court; and (iv) whether the three questions were questions which concerned constitutional matter.

Held, dismissing the appeals, upholding the decisions of the SCJ, and remitting the case to the SC for the continuation of the trial until its final conclusion:

(1) The court followed the decision of His Lordship, the Lord President Tun Azmi (as he then was) in the case of *Yeoh Tat Thong v Government of Malaysia & Anor* [1973] 2 MLJ 86 that the subordinate courts had the jurisdiction to determine any question affecting the provisions of the Constitution, except where the matter came under art 4 of the Constitution. In other words, the appellant must show where the SCJ had erred in refusing to transmit the matter at hand to the High Court and whether there were questions that only the High Court may determine. In the present appeals, the appellant failed to show where and what the error of law that the SCJ had committed (see paras 23–25).

(2) The EA was a general law governing the general law on reception of evidence while the Act was a specific law on sexual offences against children. Further, s 133A of the EA was applicable whether the child was a victim or offender or a witness but s 18 of the Act was specifically for a child who was a victim. Any law that was of general application must be subject to modifications when it came to children as defined under s 2 of the Child Act 2001. This was because of the maxim *generalia specialibus non derogant* ie a specific provision in a specific law overrides a general provision in a general law (see paras 33 & 38–39).

(3) The court found that the public prosecutor was not relieved of his burden at all. What happened was that emphasise was given on the child evidence where a child was the victim (and not in any other case). It did not relieve the prosecution of their duty under s 101 of the EA. The second question and the third question were not at all constitutional issues but rather jurisprudential issues and the application of legal principles in the rule of harmonious construction. Further, both questions were on principle and for the sake of clarity and convenience in practice, burdens should be evidential only (see paras 56–57).

(4) There was no basis to hold s 18 of the Act as unconstitutional as it was not in violation of any express, enumerated right in the Constitution. The wordings of the Constitution were abundantly clear in that there was no

such presumption of innocence which was given express mention therein. As such, the presumption of innocence remained to this day a 'rule of evidence'. Even if one were to read the Constitution 'prismatically' and broadly so as to encompass non-textual and non-enumerated rights, this should not be done so as to declare a law validly passed by the Parliament to be ultra vires the Constitution where the Constitution itself was devoid of reference to such a right. This would lead to not only uncertainty in the application of the law but also absurdity, as it would lead to the result where laws could be overturned, not by testing those laws against the express Constitutional safeguards but by reading into the Constitution, words that did not exist. Further, measuring one provision of a federal law against another provision of another federal law was not the manner by which a legislation may be declared unconstitutional (see paras 103, 121–124 & 139–140).

(5) The court had considered the following principles of law: (a) there was a presumption of the constitutional validity of the impugned section; (b) the burden of proof lay on the party seeking to establish the contrary; (c) where a law purported to authorise restrictions in language wide enough to cover restrictions both within and without the permissible limits of legislative action, it could not be upheld, not even so far as it was applied within the constitutional limits; (d) it was impossible to apply the principle of severability; and (e) if certain provisions of law construed in one way would make them consistent with the Constitution and another interpretation would render them unconstitutional, the court would lean in favour of the former construction. The court found no error on the part of the SCJ that warranted appellate intervention, as such, the court declined to struck down s 18 of the Act as unconstitutional (see paras 142–145).

[Bahasa Malaysia summary

Terdapat tiga pertuduhan di bawah s 14(a) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 ('Akta tersebut') terhadap perayu di mahkamah sesyen ('MS') di mana hakim mahkamah sesyen ('HMS') mendapati bahawa kes prima facie telah dibuktikan terhadap perayu. Perayu kemudian memfailkan permohonan untuk merujuk tiga soalan ('tiga soalan tersebut') kepada Mahkamah Tinggi menurut s 30 Akta Mahkamah Kehakiman 1964. Tiga soalan tersebut ialah: (a) sama ada s 18 Akta tersebut memberi kuasa kepada hakim bicara untuk mensabitkan kesalahan ke atas orang yang dituduh berdasarkan keterangan kanak-kanak yang tidak disokong yang bertentangan dengan perkara 5 dan perkara 8 Perlembagaan Persekutuan ('Perlembagaan') ('soalan pertama'); (b) sama ada s 18 Akta tersebut memberi kuasa kepada hakim bicara untuk mensabitkan orang yang dituduh berdasarkan keterangan kanak-kanak yang tidak disokong yang bertentangan dengan s 133A Akta Keterangan 1950 ('AK') ('soalan kedua'); dan (c) sama ada s 18 Akta tersebut

memberi kuasa kepada hakim bicara untuk mensabitkan orang yang dituduh berdasarkan keterangan kanak-kanak yang tidak disokong dan oleh itu telah meringankan beban pendakwa raya untuk membuktikan pendakwaan jenayah di bawah s 173(m) Kanun Tatacara Jenayah ('KTJ') ('soalan ketiga'). Pada akhir kes, HMS menolak permohonan tersebut dan memutuskan bahawa MS mempunyai bidang kuasa untuk membicarakan persoalan yang timbul tentang kesan peruntukan Perlembagaan yang dirujuk oleh pihak pembelaan semasa perbicaraan perayu. Dalam rayuan ini, isu-isu untuk penentuan ialah: (i) sama ada MS boleh menolak untuk merujuk soalan berkaitan isu Perlembagaan kepada Mahkamah Tinggi; (ii) sama ada Mahkamah Tinggi boleh memutuskan apa-apa perkara yang melibatkan permasalahan Perlembagaan; (iii) sama ada wajib untuk merujuk persoalan-persoalan yang melibatkan perkara perlembagaan kepada Mahkamah Persekutuan; dan (iv) sama ada ketiga-tiga soalan tersebut adalah soalan-soalan yang berkaitan dengan Perlembagaan.

Diputuskan, menolak rayuan-rayuan, mengesahkan keputusan HMS dan mengembalikan kes kepada MS untuk sambungan perbicaraan sehingga keputusan muktamad:

(1) Mahkamah mengikut keputusan Yang Arif, Ketua Hakim Negara Tun Azmi (ketika itu) dalam kes *Yeoh Tat Thong v Government of Malaysia & Anor* [1973] 2 MLJ 86 bahawa mahkamah bawahan mempunyai bidang kuasa untuk menentukan apa-apa persoalan yang memberi kesan kepada peruntukan Perlembagaan, kecuali jika perkara tersebut berada di bawah perkara 4 Perlembagaan. Dalam erti kata lain, perayu mesti menunjukkan di mana HMS telah terkhilaf dalam keengganannya merujuk perkara tersebut kepada Mahkamah Tinggi dan sama ada terdapat persoalan yang hanya boleh ditentukan oleh Mahkamah Tinggi. Dalam rayuan-rayuan semasa, perayu gagal menunjukkan di mana dan apakah kekhilafan undang-undang yang telah dilakukan oleh HMS (lihat perenggan 23–25).

(2) Akta Keterangan 1950 ialah undang-undang am yang mengawal undang-undang am mengenai penerimaan keterangan manakala Akta tersebut ialah undang-undang khusus mengenai kesalahan seksual terhadap kanak-kanak. Selanjutnya, s 133A AK terpakai sama ada kanak-kanak tersebut adalah mangsa atau pesalah atau saksi tetapi s 18 Akta tersebut khusus untuk kanak-kanak yang menjadi mangsa. Mana-mana undang-undang yang digunakan secara am mesti tertakluk kepada pengubahsuaian apabila melibatkan kanak-kanak seperti yang ditakrifkan di bawah s 2 Akta Kanak-Kanak 2001. Ini adalah disebabkan oleh maksim *generalia specialibus non derogant* iaitu peruntukan khusus dalam undang-undang khusus mengatasi peruntukan am dalam undang-undang am (lihat perenggan 33 & 38–39).

(3) Mahkamah mendapati bahawa pihak pendakwa raya tidak terlepas sama sekali daripada beban pembuktiannya. Apa yang berlaku ialah penekanan diberikan pada keterangan kanak-kanak apabila seorang kanak-kanak menjadi mangsa (dan bukan dalam mana-mana kes lain). Ia tidak mengecualikan pendakwaan daripada kewajipan mereka di bawah s 101 AK. Soalan kedua dan soalan ketiga sama sekali bukan isu Perlembagaan tetapi lebih kepada isu perundangan dan penggunaan prinsip undang-undang dalam peraturan pentafsiran harmoni. Selanjutnya, kedua-dua soalan adalah pada prinsip dan demi kejelasan dan kemudahan dalam amalan, beban hendaklah pada pembuktian sahaja (lihat perenggan 56–57).

(4) Tiada asas untuk memutuskan bahawa s 18 Akta tersebut sebagai tidak berperlembagaan kerana ia tidak melanggar mana-mana hak nyata, yang dinyatakan dalam Perlembagaan. Perkataan-perkataan dalam Perlembagaan adalah sangat jelas di mana tidak ada anggapan tidak bersalah yang dinyatakan secara jelas di dalamnya. Oleh yang demikian, anggapan tidak bersalah kekal sehingga hari ini sebagai 'rule of evidence'. Walaupun seseorang itu membaca Perlembagaan 'secara prisma' dan meluas sehingga merangkumi hak yang tidak tertulis dan tidak dinyatakan, ini tidak sepatutnya dilakukan untuk mengisytiharkan undang-undang yang diluluskan oleh Parlimen secara sah sebagai ultra vires Perlembagaan di mana Perlembagaan sendiri tidak merujuk kepada hak tersebut. Ini bukan sahaja akan membawa kepada ketidakpastian dalam penggunaan undang-undang tetapi ianya juga tidak masuk akal, kerana ia akan membawa kepada keputusan di mana undang-undang boleh dibatalkan, bukan dengan menguji undang-undang tersebut terhadap perlindungan Perlembagaan yang jelas tetapi dengan membaca ke dalam Perlembagaan perkataan-perkataan yang tidak wujud. Selanjutnya, membuat perbandingan satu peruntukan dalam undang-undang persekutuan terhadap peruntukan lain dalam undang-undang persekutuan yang lain bukanlah cara sesuatu perundangan boleh diisytiharkan sebagai tidak berperlembagaan (lihat perenggan 103, 121–124 & 139–140).

(5) Mahkamah telah mempertimbangkan prinsip-prinsip undang-undang berikut: (a) terdapat anggapan kesahihan perlembagaan bagi peruntukan yang dipertikaikan; (b) beban pembuktian terletak pada pihak yang ingin membuktikan sebaliknya; (c) jika sesuatu undang-undang yang dikatakan membenarkan sekatan dalam bahasa yang cukup luas untuk meliputi sekatan di dalam dan melebihi had tindakan perundangan yang dibenarkan, ia tidak boleh ditegakkan, walaupun ia digunakan dalam had perlembagaan sahaja; (d) adalah mustahil untuk menggunakan prinsip kebolehpisahan; dan (e) jika peruntukan undang-undang tertentu yang ditafsirkan dalam satu cara akan menjadikannya selaras dengan Perlembagaan dan tafsiran lain akan menjadikannya tidak

berperlembagaan, mahkamah akan bersandar kepada pentafsiran yang pertama. Mahkamah mendapati tiada kekhilafan di pihak HMS yang mewajarkan campur tangan rayuan, oleh itu, mahkamah menolak untuk membatalkan s 18 Akta tersebut sebagai tidak berperlembagaan (lihat perenggan 142–145).]

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)
Austin Heights Sdn Bhd v Teh Hing Koon & Anor [2019] MLJU 2034; [2020] 1 LNS 887, HC (refd)
Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285; [2008] 1 CLJ 521, FC (refd)
Baker Nichols v Baker, In re (1890) 44 Ch D 262, Ch D (refd)
Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297; [2011] 8 CLJ 766, FC (refd)
Brend v Wood (1946) 62 TLR 462 (refd)
Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act, Re AIR 1939 FC 1 (refd)
CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 4 MLJ 236; [2021] 6 CLJ 471, FC (refd)
Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155; [1976] 1 LNS 19, FC (refd)
Delhi and London Bank, Limited v Melmoth AD Orchard LR 4 IA 127, PC (refd)
Diana Nelson Tanoja v PP [2010] 2 MLJ 573, FC (refd)
Julius v Lord Bishop of Oxford (1880) 5 App Cas 214, HL (refd)
Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289; [2005] 4 CLJ 169, CA (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govindasamy [1982] 2 MLJ 232, FC (refd)
Lim Chin Aik v Regina [1963] 1 MLJ 50, PC (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
Maneka Gandhi v Union of India 1978 AIR 597, SC (refd)
Md Yusoff bin Ahmad v Siti Hajar bt Sarkawi & Anor [2013] 1 MLJ 329; [2013] 1 CLJ 200, CA (refd)
Mohamed Sugal Esa Mamasan Rer Alalah v The King AIR 1946 SC 3, PC (refd)
Mohd Rasul bin Mat Lasi v PP [2021] MLJU 2230, HC (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64; [1980] 1 LNS 181, PC (refd)
Ooi Kean Thong & Anor v PP [2006] 3 MLJ 389; [2006] 2 CLJ 701, FC (refd)
Phang Chin Hock v PP [1980] 1 MLJ 70; [1979] 1 LNS 67, FC (refd)
Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72; [2002] 4 CLJ 105, FC (refd)
PP v Azmi bin Sharom [2015] 6 MLJ 751; [2015] 8 CLJ 921, FC (refd)

PP v Chew Choon Ming & Ors [1987] 2 MLJ 522 (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116; [1976] 1 LNS 180 (refd)
PP v Gan Boon Aun [2017] 3 MLJ 12; [2017] 4 CLJ 41, FC (refd)
PP v Harmenderpall Singh a/l Jagara Singh [2007] 3 MLJ 433; [2007] 2 CLJ 577, CA (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1; [2007] 6 CLJ 341, FC (refd)
PP v Mardai [1950] 1 MLJ 33; [1949] 1 LNS 65 (refd)
PP v Pung Chen Choon [1994] 1 MLJ 566; [1994] 1 LNS 208, SC (refd)
PP v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273, FC (refd)
PP v Su Liang Yu [1976] 1 LNS 113; [1978] 2 MLJ 79 (refd)
Rashidah bt Abd Ghani (as the administrator of the estate of the deceased Rohaizad bin Naim) v SJ Classic Industries Sdn Bhd [2021] 9 MLJ 128, HC (refd)
S v Coetzee and Others [1997] ZACC 2 (refd)
Said Mir Bahrami v Pengarah Penjara Sungai Buloh, Selangor [2013] 2 MLJ 478; [2013] 5 CLJ 447, FC (refd)
State of Bihar & Ors Etc v Bihar Distillery Ltd Etc AIR 1997 SC 1511, SC (refd)
State of Haryana v Raghubir Dayal 1995 SCC (1) 133, SC (refd)
Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor [1999] 1 MLJ 266; [1999] 1 CLJ 481, CA (refd)
Tan Boon Liat @ Allen & Anor et al, Re [1977] 2 MLJ 108, FC (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 CLJ 771, CA (refd)
Teo Chee Kong v PP [2021] MLJU 1054; [2021] 8 CLJ 29, CA (refd)
Woolmington v Director of Public Prosecutions [1935] AC 462; [1935] All ER Rep 1, HL (refd)
Yeoh Tat Thong v Government of Malaysia & Anor [1973] 2 MLJ 86 (folld)
Yii Hung Siong v PP [2005] 6 MLJ 432; [2005] 4 CLJ 158, HC (refd)
Yong Vui Kong v PP and another matter [2010] 3 SLR 489, CA (refd)
ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener) [2016] 1 MLJ 153; [2015] 8 CLJ 621, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
Capital Markets and Services Act 2007
Child Act 2001 ss 2, 15, 97(2)
Constitution of the Republic of South Africa 1996 s 25(3), (3)(c)
Courts of Judicature Act 1964 ss 30, 84, 84(4), 85, 90
Criminal Procedure Code ss 173(m), 181, 269
Evidence Act 1950 ss 101, 133A, 134
Federal Constitution arts 5, 5(1), 7(2), 9(1), 8, 8(1), 12(1), 73, 74, 75, 76, 77, 78, 79, 121, 121(1), 123, 159
Immigration Act 1959/63 s 59A
Immigration Ordinance [SG] ss 6(2), (3), 9

Indian Constitution [IND]
Securities Industry Act 1983 (repealed by Capital Markets and Services Act 2007) ss 86, 86(b), 122, 122(1), 122B(a)(bb), 122C(c)
Sexual Offences Against Children Act 2017 s 18

Azlan bin Abdul Razak (Tuw Min Ric with him) (Ong, Ric & Partners) for the appellant.
Mustaqim bin Sukarno (Raudhah bt Mazman with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Awang Armadajaya JC:

INTRODUCTION

[1] These are appeals against the decisions of the learned sessions given on 25 January 2021 in Segamat whereby the learned sessions court judge ruled that the sessions court has the jurisdiction to determine question that arises as to the effect of the provision of the Constitution referred by the defence during the course of the trial of the accused person/appellant.

THE BACKGROUND FACTS

[2] The applicant/accused was charged at the instance of the public prosecutor on three counts of sexual assault against three different children and the one of the charges reads as follows:

> That you, on 5 January 2019, at about 1000hours, at Ci Guang Ting Temple, Jalan Genuang, in the District of Segamat, in the State of Johore, committed sexual assault on one male child by the name of (victim) who was aged 16 years and 11 months and you thereby committed an offence under section 14(a) Sexual Offences Against Children 2017 which may be punished under the same provision of the Act.

[3] The names of the children are withheld pursuant to s 15 of the Child Act 2001. The charges are the same but there are three different children.

[4] The applicant/accused pleaded not guilty and was tried by the sessions court in Segamat. At the end of the prosecution's case, on 7 June 2020, the learned sessions court judge found that the prosecution has succeeded in proving a prima facie case against the applicant/accused on all charges and ordered him to enter his defence on all the charges.

[5] The defence then applied to the sessions court to refer three questions to the High Court pursuant to s 30 of the Courts of Judicature Act 1964 which are as follows:

(a) whether s 18 of the Sexual Offences Against Children Act 2017

empowers a trial judge to convict an accused person based on uncorroborated evidence of a child which is contrary to arts 5 and 8 of the Federal Constitution;

(b) whether s 18 of the Sexual Offences Against Children Act 2017 empowers a trial judge to convict an accused person based on uncorroborated evidence of a child which is contrary to s 133A Evidence Act 1950; and

(c) whether s 18 of the Sexual Offences Against Children Act 2017 empowers a trial judge to convict an accused person based on uncorroborated evidence of a child and therefore has relieved the public prosecutor of the burden of proving a criminal prosecution under s 173(m) of the Criminal Procedure Code.

[6] The prosecution objected to the reference of all these questions to the High Court and asked the sessions court to reject the application.

[7] After hearing all parties, the learned sessions court judge declined the application and ruled that s 30 of the Courts of Judicature Act 1964 empowers the sessions court to make the appropriate ruling and hence this appeal.

THE ISSUES IN THESE APPEALS

(i) whether the sessions court may refuse to refer questions concerning constitutional issues to the High Court;

(ii) whether the High Court may decide on any matter of constitutional concern;

(iii) whether it is mandatory to refer questions of constitutional matter to the Federal Court;

(iv) whether the three questions referred are questions which concern constitutional matter;

(v) the three questions which are:

(a) whether s 18 of the Sexual Offences Against Children 2017 empowers a trial judge to convict an accused person based on uncorroborated evidence of a child which is contrary to arts 5 and 8 of the Federal Constitution;

(b) whether s 18 of the Sexual Offences Against Children 2017 empowers a trial judge to convict an accused person based on uncorroborated evidence of a child which is contrary to s 133A of the Evidence Act 1950; and

(c) whether s 18 of the Sexual Offences Against Children 2017 empowers a trial judge to convict an accused person based on

uncorroborated evidence of a child and therefore has relieved the public prosecutor of the burden of proving a criminal prosecution under s 173(m) of the Criminal Procedure Code.

I shall deal with the issues accordingly.

(i) whether the sessions court may refuse to refer questions concerning constitutional issues to the High Court

(ii) whether the High Court may decide any matter of constitutional concern

(iii) whether it is mandatory to refer questions of constitutional matter to the Federal Court

I shall deal with the three issues together.

[8] The reference of constitutional matters is provided for under s 30 of the Courts of Judicature Act 1964 and I reproduced the same for ease of reference:

30 Reference of constitutional question by subordinate court

(1) *Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court.*

(2) Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen.

(3) Subsections (1) and (2) shall be deemed to be rules of court for the purposes of Article 128 (2) of the Constitution.

[9] Subsection (1) reads:

(1) Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court *may stay the* proceedings *and may transmit the record* thereof to the High Court.

[10] In both usages, the terminology used is 'may'. There have been many usages of the word 'may'.

[11] In *Bindra's Interpretation of Statutes* (10th Ed) (p 1668) the word 'May' has been explained as follows: The word 'may' is prima facie enabling and permissive.

[12] In *Stroud's Judicial Dictionary* (5th Ed), 'May' means:

(a) through the dicta of eminent judges which may be quoted to the contrary, it seems a plain conclusion that 'may', 'it shall be lawful', 'is shall and may be lawful', 'empowered', 'shall hereby have power', 'shall think proper', and such like phrases, give, in their ordinary meaning, an enabling and discretionary power. 'They are potential and never (in themselves) significant of any obligation' (per Lord Selborne, *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214); and

(b) *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214, 'may' be regarded as the leading case on the principles therein referred to by Lord Cairns for construing as *obligatory*, phrases which in their ordinary meaning are *merely enabling*.

[13] Justice Cotton in *In re Baker Nichols v Baker* (1890) 44 Ch D 262 at p 268 (quoting *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214) held that:

> It is an inaccuracy of language to say that 'may' can mean 'must' or 'shall'. *It simply confers a power*. We must look at the object of the statute to see whether a duty to exercise the power is imposed.

[14] In *Austin Heights Sdn Bhd v Teh Hing Koon & Anor* [2019] MLJU 2034; [2020] 1 LNS 887, the High Court held that:

> [53] The word 'may' is not a mandatory provision, nor does it excludes others. In the context of this case, 'may' here is what in law is known as an enabling/empowering clause.
>
> [54] It gives power (which otherwise) does not exist. It does not prevent anyone else from exercising any rights/power provided by law.

[15] In *Delhi and London Bank, Limited v Melmoth AD Orchard* LR 4 IA 127, the Privy Council opined that:

> There is no doubt that in some cases the word must, or the word shall, may be substituted for the word may; but that can be done only for the purpose of giving effect to the intention of the Legislature; but in the absence of proof of such intention, the word may must be taken to be used in its natural, therefore in a permissive, and not in an obligatory, sense.

[16] In *Md Yusoff bin Ahmad v Siti Hajar bt Sarkawi & Anor* [2013] 1 MLJ 329; [2013] 1 CLJ 200 the Court of Appeal held that:

> Ordinarily the use of the word 'shall' implies a mandatory obligation but that is not an absolute rule in all cases. In *Bindra, Interpretation of Statutes* (8th Ed at pp 1029–1030 it is stated as follows:
>
> > The word 'shall' in its ordinary signification is mandatory though there may be considerations which influence the Court in holding that the intention of the Legislature was to give discretion. But this word is not necessarily mandatory,

nor always mandatory. Whether the matter is mandatory or directory only depends upon the real intention of the Legislature which is ascertained by carefully attending to the whole scope of the statute to be construed. A

The use of the word 'shall' would not by itself make a provision of the Act mandatory. It is to be construed with reference to the context in which it is used. Similarly, mere use of the word 'shall' or the absence of it, does not decide the question whether a provision is directory or mandatory. When a statute uses the word 'shall' prima facie, it is mandatory, but the Court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provision, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow there from, and, above all, whether the object of the legislation will be defeated or furthered. B C D

[17] In the case of *State of Haryana v Raghubir Dayal* 1995 SCC (1) 133, the Supreme Court of India had occasion to observe as follows: E

The word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, or consequences to flow from such construction would not so demand. Normally, the word 'shall' prima facie ought to be considered mandatory but it is the function of the court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word 'shall' therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be ascribed to the word, 'shall' as mandatory or as directory, accordingly. F G

[18] In *Public Prosecutor v Chew Choon Ming & Ors* [1987] 2 MLJ 522, His Lordship Justice KC Vohrah held that:

In fact a presiding officer of a subordinate court has discretion to determine a question arising as to the effect of the Constitution or to refer the matter to the High Court in accordance with s 30 of the Courts of Judicature Act 1964. If all the ingredients in the charges had been made out the magistrate then would have been justified in dealing with the constitutional issues at the close of the prosecution case. But if a presiding officer of a subordinate court has to determine a question on constitutional law, the question should not be an illusory one thrown in as a red herring. Nor should he be content with desultory submissions from police officers prosecuting the case or from defence counsel, dealing only with general statements on constitutional law without there being a proper analysis of the constitutional issues. H I

[19] The latest decision of the Court of Appeal is the case of *Teo Chee Kong v Public Prosecutor* [2021] MLJU 1054; [2021] 8 CLJ 29, where the facts were that the police launched a corruption investigation involving senior officers of the Sabah Water Department of which the appellant was the deputy director. However, unlike the other senior officers, the appellant was not immediately charged. Instead, the prosecution commenced forfeiture applications on the cash monies seized from the appellant, the monies in his bank accounts and his landed properties. The appellant was only brought to the sessions court some 14 months later where 146 charges of money laundering under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFPUAA') were preferred against him ('AMLATFPUAA charges'). The appellant applied: (i) at the High Court, to set aside the AMLATFPUAA charges against him ('application to set aside the AMLATFPUAA charges'); and (ii) at the sessions court to refer ten constitutional questions to the High Court, under s 30 of the Courts of Judicature Act 1964 ('the CJA') ('application under s 30 of the CJA'). As there was fear of 'duplicity', since both applications were filed around the same time, the appellant withdrew the application under s 30 of the CJA. The High Court dismissed the application to set aside the AMLATFPUAA charges and, following that, the appellant filed an application at the High Court to refer the same ten constitutional questions, with the addition of two new questions ('12 constitutional questions'), to the Federal Court for determination, pursuant to s 84 of the CJA. All 12 constitutional questions centered around the fact that the prosecution did not charge the appellant immediately but proceeded with forfeiture applications. After answering all 12 constitutional questions in the negative, noting that they were premature and a repetition of the appellant's previous application to set aside the AMLATFPUAA charges, the High Court judge ('HCJ') proceeded to dismiss the application on the ground that the application was frivolous and would delay the expeditious conduct of the trial. The HCJ then ordered the trial on the AMLATFPUAA charges to proceed at the sessions court. Hence, the present appeal. In support of his appeal, the appellant submitted that, inter alia, the HCJ: (i) acted beyond her judicial power and jurisdiction, under s 84 of the CJA, by answering and dealing with the merits of the 12 constitutional questions instead of transmitting the questions to the Federal Court for determination; and (ii) erred in holding that the application to refer the 12 constitutional questions was unnecessary and a repetition. The appellant further prayed for an order that the 12 constitutional questions be remitted to another HCJ to be reheard. His Lordship, Court of Appeal Justice Ravinthran Paramaguru (speaking for the court) ruled that:

> [20] In the instant case, at the outset, in para [7] of her judgment, the learned High Court judge cited *Gan Boon Aun v Public Prosecutor* and directed herself that she has to consider whether there is a constitutional issue on matters referred that is necessary for the determination of the proceedings in the sessions court.
>
> [21] However, Her Ladyship's gave a negative answer to the said questions and ruled

as follows:

> Due to the reasons above, I find that that there is no merit in the Criminal Application BKI-44–112 of 2018 and BKI-44–915 of 2018 and therefore I dismissed this application and case is remitted back to the session's court and order the trial to proceed expeditiously.

[22] Notwithstanding the discretionary power of the High Court, having regard to the plain words of ss 30 and 84, we would agree with counsel for appellant that it was not necessary for the learned High Court judge to proffer any answer, 'negative' or 'affirmative' to the questions posed by the appellant when dismissing the application. Therefore, the negative answers are of no consequence and do not bind the sessions court. However, the 'negative' answer given by learned High Court judge does not necessarily mean that she did not address her mind to the duty imposed under the said provisions to consider whether there was a question necessary for the determination of the proceedings. As we said earlier, it was within the discretion of the High Court not to transmit the record to the Federal Court in the form of a special case and the fact that learned High Court judge did not do so means that a decision on the question was not, to quote the words of the s 30, 'necessary for the determination of the proceeding'.

[23] We also think that the case of *Gan Boon Aun v Public Prosecutor* which was relied on heavily by counsel for the appellant ought to be distinguished. In that case, the High Court answered the constitutional question in the affirmative instead of stating the question in the form of a special case to the Federal Court and acquitted and discharged the accused person. It was for this reason, the order was set aside and remitted to the High Court for the application to be reconsidered whether it should be transmitted to the Federal Court in the form of a special case.

[24] Lastly, even if the questions come within the ambit of s 84, the High Court is not obliged in all instances to transmit the questions in the form of a special case to the Federal Court if such a course would delay the trial. The permissive 'may' is employed in s 84 as pointed out in *Gan Boon Aun v Public Prosecutor*. In the instant case, High Court did not refer the questions to the Federal Court for another reason. The learned High Court judge found that the application was frivolous and would delay the expeditious conduct of the trial. This finding is quite clear from her judgment. In para [14] of her judgment, she quoted a passage from the judgment of *Gan Boon Aun v Public Prosecutor* where the Federal Court cautioned that an application under s 30 could be a frivolous application that is intended to delay the conduct of the trial. A careful reading of s 84 would support the view an application under it need not be referred to the Federal Court if it will hamper the expeditious conduct of the trial. 'Determination of the proceeding' in ss 30 and 84 means final resolution of the proceedings. We say so for the following reasons. Section 84(2) says that the High Court in referring the questions to the Federal Court must consider the stage of the hearing where questions of fact can be settled to assist the Federal Court in deciding the question. In addition, the same provision says that the purpose of the decision is for the speedy and economical 'final' determination of the proceedings.

[25] There was a good reason why the learned High Court judge belaboured the 'expeditious conduct of trial' point. As we pointed out earlier, all the purported constitutional questions only arise from the fact the prosecution did not charge the

appellant immediately but proceeded with forfeiture applications. We are mindful that the appellant did not cite any purported breach of constitutional provisions in his previous application to strike out the charges but it is nonetheless based on the very same facts as the instant application, i.e, that the prosecution elected to proceed by way of forfeiture application before preferring the 146 charges. This is clear from para (1) of the notice of motion in the striking out application which reads as follows:

> 1(a) The conduct of the public prosecutor by initiating two (2) Forfeiture Proceedings, one (1) Prohibitory Proceeding in High Court and one (1) Forfeiture Proceeding in the sessions court and after obtaining judgments in the High Court on 13.12.2017 had subsequently thereafter on 13.12.2017 instituted 146 charges against the Applicant/Accused in the sessions court (hereinafter referred to as 'said 146 charged') amount to multiplicity of criminal proceedings, is mala fide, oppressive and an abuse of the process of the court;

[26] In the premises, the learned High Court judge had material to conclude that the instant application was to large extent a 'repetition' which would delay the trial and is therefore an abuse of the process of the court. In fact, the appellant could have raised the constitutional questions in the striking out application instead of proceeding by way instalments by invoking s 30 of the Courts of Judicature Act 1964. That is why in answering the questions posed by the appellant, apart from providing a negative answer to the questions, the learned High Court judge also said that the questions were 'premature' and a 'repetition'. In fact, the trial of the appellant and others has been delayed since 2017 because of this and other applications.

Conclusion

[27] For all the above reasons, we cannot say that the learned High Court judge was plainly wrong when she refused to exercise her discretion under s 84 of the Courts of Judicature Act 1964. Therefore, there is no reason why we should order another High Court judge to rehear the application. The questions posed by the appellant could all be raised at the trial in the sessions court or during the appellate stage. For this reason, the trial in the sessions court should proceed but with the direction that the purported 'answer' to the questions by the High Court be not treated as binding but heard afresh if they arise again. We shall therefore dismiss the appeal.

[20] His Lordship, the Lord President Azmi in *Yeoh Tat Thong v Government of Malaysia & Anor* [1973] 2 MLJ 86 at p 87:

> ... it is my view that the High Court and indeed subordinate courts have jurisdiction to determine any question affecting the provisions of the Federal Constitution, except where the matter comes under art 4.

[21] The Federal Court case of *Diana Nelson Tanoja v Public Prosecutor* [2010] 2 MLJ 573 has held that:

> [37] The word 'may' indicates discretion. Therefore, it could be seen that submission at the end of the defence case is discretionary and not mandatory.

[22] In *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, the Lord President Tun Suffian opined:

> The applicant wants to attack the validity of the Firearms (Increased Penalties) Act 1971 not on the ground that it relates to a matter with respect to which Parliament has no power to make law. In my judgment, this Act deals with criminal law and the administration of justice, both matters with respect to which Parliament has power to make law (see item 4 of List I in the Ninth Schedule to the Constitution). The applicant says that the Act is invalid because it is inconsistent with the Constitution, ie on ground (2) set out in para 9 above. Therefore cl (4) of article 4 and cl (1) of art 128 do not apply and the point may be raised in the ordinary way in the course of submission, and determined in the High Court, without reference to the Federal Court, and there is no need for leave of a judge of the Federal Court.

[23] I take the cue from His Lordship, the Lord President Tun Azmi in *Yeoh Tat Thong* that: *subordinate courts have jurisdiction to determine any question affecting the provisions of the Federal Constitution, except where the matter comes under art 4.*

[24] In other words, the appellant must show where the learned sessions court judge had erred in refusing to transmit the matter at hand to the High Court and whether there are questions that only the High Court may determine.

[25] I have heard parties and with regrets that I say the appellant failed to show where and what the error of law that the learned sessions court judge has committed. I found none and I ruled it to be so.

(iv) Whether the three questions referred are questions are those that concern constitutional matter; and

(v) The three questions which are:

(a) *whether s 18 of the Sexual Offences Against Children 2017 empowers a trial judge to convict an accused person based on uncorroborated evidence of a child which is contrary to arta 5 and 8 Federal Constitution;*

(b) *whether s 18 of the Sexual Offences Against Children 2017 empowers a trial judge to convict an accused person based on uncorroborated evidence of a child which is contrary to s 133A of the Evidence Act 1950; and*

(c) *whether s 18 of the Sexual Offences Against Children 2017 empowers a trial judge to convict an accused person based on uncorroborated evidence of a child and therefore has relieved the public prosecutor of the burden of proving a criminal prosecution under s 173(m) of the Criminal Procedure Code.*

I shall deal with the two questions together.

[26] Let me begin with questions (b) and (c) first.

[27] Question (b) reads as follows:

> (b) Whether s 18 of the Sexual Offences Against Children 2017 empowers a trial judge to convict an accused person based on uncorroborated evidence of a child contrary to s 133A of the Evidence Act 1950.

[28] Question (c) reads as follows:

> (c) Whether s 18 of the Sexual Offences Against Children 2017 empowers a trial judge to convict an accused person based on uncorroborated evidence of a child and therefore has relieved the public prosecutor of the burden of proving a criminal prosecution under s 173(m) of the Criminal Procedure Code.

[29] The challenge mounted against s 18 of the Sexual Offences Against Children 2017 is based on s 133A of the Evidence Act 1950.

[30] For ease of reference I shall reproduce s 18 of the Sexual Offences Against Children 2017:

> 18 Evidence of child witness
>
> *Notwithstanding anything contrary in any other written law,* in any proceedings against any person relating to any offence under this Act, or any offence specified in the Schedule where the victim is a child, *the court may convict such person of such offence* on the basis of the uncorroborated evidence of a child, given upon oath or otherwise.

[31] The other legislation that learned counsel for the appellant is drawing our mind to is s 133A of the Evidence Act 1950 which stipulates:

> 133A Evidence of child of tender years
>
> Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code [Act 593] *shall be deemed to be a deposition within the meaning of that section:*
>
> *Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.*

[32] The key arguments of learned counsel for the appellant is that s 133A of the Evidence Act 1950 provides that '... Provided that, where evidence

admitted by virtue of this section is given on behalf of the prosecution, the accused *shall not be liable* to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him ...' which is qualified by s 18 of the Sexual Offences Against Children Act 2017 which reads 'where the victim is a child, the court may convict such person of such offence on the basis of the uncorroborated evidence of a child, given upon oath or otherwise.

[33] A cursory reading of both provisions of the law would invariably bring us to the following observations:

(a) the Evidence Act 1950 is a general law governing the general law on reception of evidence while the Sexual Offences Against Children Act 2017 is a specific law on sexual offences against children; and

(b) s 133A, the Evidence Act 1950 is applicable whether the Child is a victim or offender or a witness but s 18 of the Sexual Offences Against Children Act 2017 is specifically for a child who is a victim.

[34] There are several principles of law that may be distilled from s 133A of the Evidence Act 1950 which are as follows:

(a) any child of tender years called as a witness in a criminal proceeding against any accused.

(b) in the opinion of the court the child does not understand the nature of an oath.

(c) his unsworn evidence may be received.

(d) if he is:

  (i) possessed of sufficient intelligence to justify the reception of the evidence; and

  (ii) understands the duty of speaking the truth;

  (iii) his evidence taken and reduced into writing in accordance with s 269 of the Criminal Procedure Code; and

  (iv) shall be deemed to be a deposition within the meaning of that section;

(e) but the accused shall not be liable to be convicted of the offence (contrary to the general rule under s 134 of the Evidence Act) if there is no evidence is corroborated by some other material evidence implicating him.

[35] This started many years ago even before the Evidence Act 1950 came in to force when Lord Goddard in the case of *Mohamed Sugal Esa Mamasan Rer*

Alalah v The King AIR 1946 SC 3, at p 6 said:

> It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law.

[36] The following propositions may be safely stated as firmly established in *Mohamed Sugal Esa Mamasan Rer Alalah* are as follows:

(a) as a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character;

(b) unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character; and

(c) whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the judge before whom the case comes.

[37] A child is defined in s 2 of the Child Act 2001 as:

> (a) means a person under the age of eighteen years; and
>
> (b) in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code [Act 574].

[38] Hence any law that is of general application must be subject to modifications when it comes to children as defined under s 2.

[39] This is because of the maxim *generalia specialibus non derogant* meaning a specific provision in a specific law overrides a general provision in a general law. The general principle to be applied to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together. And the reason is that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.

[40] As a corollary from the doctrine that implied repeals are not favoured, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.

[41] The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all (see *Mohd Rasul bin Mat Lasi v Public Prosecutor* [2021] MLJU 2230).

[42] Even before this Act was in force, there are judicial pronouncements that deals with the same principle of law.

[43] In *Public Prosecutor v Mardai* [1950] 1 MLJ 33; [1949] 1 LNS 65 His Lordship Justice Spenser Wilkinson has this to say:

> Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated, nevertheless it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant's story. It would be sufficient, in my view, if that corroboration consisted only of a subsequent complaint by the complainant herself provided that the statement implicated the accused and was made at the first reasonable opportunity after the commission of the offence.

[44] In resolving conflicting interpretation of laws, the court is entitled to deploy the five main principles of the 'Doctrine of Harmonious Construction':

(a) the courts must avoid a 'head of clash' of contradictory provisions and they must construe the contradictory provisions so as to harmonise them;

(b) when it is not possible to completely reconcile the differences in contradictory provisions, the court must interpret them in such a way so as to give effect to both provisions as much as possible;

(c) courts must keep in mind that the interpretation which reduces one provision to a useless standing is against the essence of 'Harmonious Construction';

A (d) to harmonise the provisions is not to render them fruitless or destroy any statutory provision; and

(e) the provision of one section cannot be used to render useless the other provision, unless the court, despite all its efforts, finds a way to reconcile the differences.

B

(See *Rashidah bt Abd Ghani (as the administrator of the estate of the deceased Rohaizad bin Naim) v SJ Classic Industries Sdn Bhd* [2021] 9 MLJ 128).

C **[45]** I am aware that in most circumstances the doctrine is used for interpreting different provisions of the same law but it is equally applicable for different Acts of Parliament that concern the same subject matter.

[46] In *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12; [2017] 4 CLJ 41 D the facts were that the respondent and one Khiudin ('Khiudin'), both Directors of Transmile Group Bhd, were charged at the sessions court with the commission of offences under the Securities Industry Act 1983 ('the SIA') (since repealed by the Capital Markets and Services Act 2007). The principal charge was for making a misleading statement in a material particular in E Transmile Group Bhd's report, thereby committing an offence under s 86(b) read together with s 122C(c) of the SIA, whilst the alternative charge was that Transmile Group Bhd had committed an offence when it, with intent to deceive, furnished a misleading statement to Bursa Malaysia Securities Bhd in Transmile Group Bhd's report and that the respondent and Khiudin, as the F Directors, were deemed to have committed an offence under s 122B(a)(bb) read together with s 122(1) of the SIA. At the close of the prosecution's case, the trial court acquitted the respondent and Khiudin of the principal charge but ordered their defence to be entered on the alternative charge. However, the respondent and Khiudin raised the objection to the alternative charge, G contending that it was unconstitutional and was therefore null and void by reason of the deeming provision in s 122. The respondent and Khiudin then successfully applied, pursuant to s 30 of the Courts of Judicature Act 1964 ('the CJA'), to refer to the High Court the question of whether s 122(1) of the SIA violates arts 5(1) and 8(1) of the Federal Constitution ('the Constitution'). The H High Court ruled that s 122(1) was unconstitutional and acquitted the respondent and Khiudin. On appeal, which was lodged only against the respondent, the Court of Appeal held that s 122 was Constitutional. However, on further appeal, the Federal Court held that: (i) only the Federal Court has the jurisdiction in a s 30 of the CJA reference to determine a question as to the I effect of any provision of the Constitution; (ii) the High Court had no jurisdiction to decide on the question or to acquit the respondent; and (iii) the Court of Appeal had no jurisdiction to hear the so called 'appeal' against the decision made by the High Court. Hence, the Federal Court struck out what it held was an incompetent appeal, set aside the orders of the High Court and

Court of Appeal and remitted the matter back to the High Court. Pursuant to the order of the Federal Court, the High Court, under ss 84(4) and 85 of the CJA, framed and referred the following 'Constitutional issues' to this court for determination: (i) whether s 122(1) of the SIA violates arts 5(1) and 8(1) of the Constitution on the basis that it abrogates the fundamental right of an accused person to be presumed innocent until proven guilty; (ii) whether s 122(1) of the SIA violates arts 5(1) and 8(1) of the Constitution on the basis that it abrogates the fundamental right of an accused that a criminal charge must be proven by the prosecution against the accused beyond reasonable doubt; (iii) whether s 122(1) of the SIA violates art 121 of the Constitution and the doctrine of separation of powers on the basis that it usurps the judicial powers of the court by deeming that a director, chief executive officer or representative of the body corporate has committed an offence where an offence has been committed by the body corporate; (iv) whether the continued prosecution of the accused for the alternative charge under s 122(1) of the SIA after his acquittal on the principal charge under s 86 of the SIA was in violation of art 7(2) of the Constitution; and (v) whether an arbitrary and indiscriminate use of s 122(1) of the SIA as alternative charge in this case was inconsistent with art 8(1) of the Constitution.

[47] The Federal Court held that:

> [19] There are exceptions to the general rule that an accused bears no onus of proof. Section 103 of the EA provides that '*the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person*'. Illustration (b) to s 103 *specifically requires B, who 'wishes the court to believe that at the time in question he was elsewhere', to prove it. Section 103 of the EA requires a defence of alibi to be proved by the accused (see Public Prosecutor v Azilah Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579 and *Dato' Seri Anwar Ibrahim v Public Prosecutor & another appeal* [2003] 4 CLJ 409; [2004] 1 MLJ 177*, which effectively held, and we agree, that* s 103 of the EA *is the provision, not* s 402A(2) of the CPC, that governs the defence of alibi; see also *Law of Evidence in Malaysia and Singapore* by Rafiah Salim at p 10, where the learned author commented, and we agree, that s 402A(2) of the CPC only deals with the procedure to be followed when the defence of alibi is introduced).
>
> [20] Section 105 of the EA provides '*when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances'. Once the prosecution has made out a prima facie case, an accused has the onus to prove the special exception in the statute* (*Abdul Razak Dalek v Public Prosecutor* [2010] 4 MLJ 725; [2010] 6 CLJ 357 at para 19 per Raus Sharif FCJ, as he then was, delivering judgment of the court) 'on a balance of probabilities — see *Ikau Anak Mail v Public Prosecutor* [1973] 2 MLJ 153; [1973] 1 LNS 51' (*Enthiran Rajoo v Public Prosecutor* [2016] 1 MLJ 71; [2015] 8 CLJ 503 per Ahmadi Asnawi JCA, delivering the judgment of the court; see also *Abdul Aziz Miew Yiong v Public*

Prosecutor [2015] 3 MLJ 556; [2014] 1 LNS 1875, *Rikky Purba v Public Prosecutor* [2014] 3 CLJ 607; [2014] 4 MLJ 569, *Sum Yat Loy lwn Public Prosecutor* [2013] 4 MLJ 762; [2012] 1 LNS 438, *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441; [2010] 3 CLJ 671, *where in each of those appeals, the Court of Appeal held that an exception must be proved on a balance of probabilities, which is the position under common law* — see also *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2005] 1 All ER 237 at para 4; in *Thitapha Charoenchuea lwn Public Prosecutor* [2016] 6 MLJ 549; [2017] 1 CLJ 1, it was recently reaffirmed by the Federal Court per Arifin Zakaria Chief Justice, delivering the judgment of the court, that the presumption under s 37(d) of the Dangerous Drugs Act is to be rebutted on a balance of probabilities).

[21] Section 106 of the EA which provides *'when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him'* is a further exception. '*This enigmatic section is intended to address exceptional circumstances in which it would not be possible or particularly difficult for a party ('the first party') to prove a fact which is only known to the other party ('the second party'), or which can be accessed by the second party with relative ease but cannot be accessed by the first party without considerable difficulty … the courts have been particularly careful about ensuring that the accused is not required to disprove the elements of the offence on the basis that he is in a better position to know about the circumstances.* For example, in *Mary Ng v R* [1958] AC 173 (which involved a charge of attempted cheating), the Privy Council advised that it was not for the appellant to prove that she had not acted deceitfully; rather it was for the prosecution to prove that she had so acted. In the more recent case of *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR 24 at [95], VK Rajah J emphasised that s 108 *(equivalent of* s 106 of the EA) does not impose any burden on the accused to prove that no crime was committed and cannot relieve the prosecution from its burden of proof. The scope of the section is *'to certain exceptional cases where it would be impossible or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' or 'particularly' within the knowledge of the accused which an accused can prove without difficulty or inconvenience …* Before s 108 comes into operation, *it must be shown that the facts are 'especially within the knowledge of any person'. This may already be clear from the evidence before the court … If the issue of knowledge of the facts is in dispute, then … the plaintiff must establish prima facie that the facts were especially within the knowledge of the defendant …*' (para [12.031], [12.033], [12.037] *Evidence and the Litigation Process* (4th Ed) by Jeffrey Pinsler SC) (see also p 3183, Vol 3, *Woodroffe & Amir Ali Law of Evidence* (19th Ed)).

[22] A reverse onus clause, where an enactment provides that a particular fact is presumed or deemed to exist *'unless the contrary is proved'*, as in the Malaysian Anti-Corruption Commission Act 2009, Customs Act 1967, Police Act 1967, Arms Act 1960, and Dangerous Drugs Act 1952, to name just a few, is also an exception to the general rule that an accused bears no onus of proof.

[23] *The oft given justification for interference with the onus of proof is necessity and the legitimate aim of the legislation in the public interest. Except that interference with the onus of proof could run foul of the presumption of innocence. Yet at the same time, there is the interest of the community at large to be protected. Three decisions of the House of Lords, namely R v Lambert* [2001] UKHL 37, *R v Johnstone* [2003] UKHL 28; [2003] 3 All ER 884 and *Sheldrake v Director of Public Prosecutions; Attorney*

General's Reference (No 4 of 2002) [2005] 1 All ER 237*, provide much valuable guide to resolve that dilemma.*

[24] In *R v Lambert*, the appellant was convicted of possession of a controlled drug, with intent to supply, contrary to s 5 of the Misuse of Drugs Act 1971. 'He relied on s 28(3)(b)(i) of that Act asserting that he did not believe or suspect, or have reason to suspect that the bag which he carried contained a controlled drug and in particular cocaine. The judge directed the jury, in accordance with what was accepted to be the law at the time, that the prosecution had to prove only that he had and knew that he had the bag in his possession and that the bag contained a controlled drug. To establish the defence under s 28(3) he had to prove on the balance of probabilities that he did not know that the bag contained a controlled drug. This was thus the legal rather than the merely evidential burden' (*R v Lambert* at para 1). The Court of Appeal held that a defendant did not have to know that he was in possession of controlled drugs or the precise controlled drug which was the subject of the offence. The appeal was dismissed. 'The Court of Appeal however certified three questions. The first in substance is whether it is an essential element of the offence of possession of a controlled drug under s 5 of the 1971 Act that the accused knew that he had a controlled drug in his possession; secondly whether in a charge contrary to s 5 the judge was right to direct the jury that the onus of proving the defence under s 28(2) imposed a legal rather than an evidential of burden of proof that the accused neither believed nor suspected nor had reason to suspect that the substance in question was a controlled drug. The third question asked whether the accused could, on an appeal after the Human Rights Act 1998 came into force, rely on an alleged breach of Convention rights by the investigating or prosecuting authority at a trial which took place before the Human Rights Act 1998 came into force' (*R v Lambert* at para 3). Five opinions were delivered by the House. All dismissed the appeal.

[25] Lord Steyn dismissed the appeal '*on the ground that the appellant cannot rely on convention rights in a national court in respect of a conviction before the 1998 Act came into force*', although His Lordship had no doubt '*that it is possible, without doing violence to the language or to the objective of that section, to read the words as imposing only the evidential burden of proof*'.

[26] Lord Steyn however held that the *House had jurisdiction to hear the substantive issue, namely, whether a reverse burden provision in s 28(2) and (3) of the Misuse of Drugs Act 1971 is compatible with the presumption of innocence contained in article 6.2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. And Lord Steyn thus enunciated on the presumption of innocence, statutory presumptions, and the need to strike a balance between public interest and Constitutional protections*:

> *[32] The approach of the common law to the presumption of innocence was memorably stated by Viscount Sankey LC in Woolmington v DPP* [1935] AC 462 at 481; [1935] All ER Rep 1 at 8 to be that *'Throughout the web of the English Criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt.' The Woolmington principle was, however, subject to Parliament legislating to the contrary. It is a fact that the Legislature has frequently and in an arbitrary and indiscriminate manner made inroads on the basic presumption of innocence … In 1972 a most distinguished Criminal Law Revision*

> *Committee had observed that 'we are strongly of the opinion that, both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only*': Eleventh Report of the Criminal Law Revision Committee: Evidence (General) (Cmnd 4991 (1972)), para 140. Nevertheless, the process of enacting legal reverse burden of proof provisions continued apace.
>
> [33] In the meantime the human rights movement came into existence. The foundation of it was the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226), which has been the starting point of subsequent human rights texts. In art 11(1) it provided: *'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law'* ... Nevertheless, and despite the right of petition to the European Court of Human Rights created for the United Kingdom in 1961, there was no constraint in our domestic law to legislative incursions on the presumption of innocence. But by the 1998 Act Parliament has provided that, subject to the ultimate Constitutional principle of the sovereignty of Parliament, inroads on the presumption of innocence must be compatible with art 6(2) as properly construed. If incompatibility arises, the subtle mechanisms of the 1998 Act come into play.

[48] In *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 LNS 181, it was contended that the requirements of the Constitution are satisfied if the deprivation of life or liberty complained of has been carried out in accordance with provision contained in any Act passed by the Parliament of Singapore, however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be. Lord Diplock, delivering the judgment of the board, disagreed. On arts 9(1) and 12(1) of the Constitution of Singapore which are identical to arts 5(1) and 8(1) of the Federal Constitution, Lord Diplock said:

> ... Their Lordships would repeat what this Board has said on many previous occasions and most recently through Lord Wilberforce in *Minister of Home Affairs & Anor v Fisher & Anor* [1980] AC 319, 329 at p 329: that the way to interpret a Constitution on the Westminster model is to treat it not as if it were an Act of Parliament but 'as sui generis, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law'. As in that case, which concerned Fundamental Rights and freedoms of the individual guaranteed by the Bermuda Constitution, their Lordships would give to Part IV of the Singapore Constitution 'a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the [fundamental liberties] referred to.
>
> Accordingly Their Lordships are unable to accept the narrow view of the effect of arts 9(1) and 12(1) for which counsel for the public prosecutor contended. This was that since 'written law' is defined in art 2(1) to mean 'this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore' and 'law' is defined as including 'written law', the requirements of the Constitution are satisfied if the deprivation of life or liberty complained of has been carried out in

accordance with provision contained in any Act passed by the Parliament of Singapore, however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be. To the full breadth of this contention one limitation only was conceded: the arbitrariness, the disregard of fundamental rules of natural justice for which the Act provides must be of general application to all citizens of Singapore so as to avoid falling foul of the anti-discriminatory provisions of art 12(1).

Even on the most literalist approach to the construction of the Constitution this argument in Their Lordships' view involves the logical fallacy of petitio principii. The definition of 'written law' includes provisions of Acts passed by the Parliament of Singapore only to the extent that they are 'for the time being in force in Singapore'; and Article 4 provides that 'any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'. So the use of the expression 'law' in arts 9(1) and 12(1) does not, in the event of challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament passed after September 16, 1963 and relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void.

In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by art 5) of arts 9(1) and 12(1) would be little better than a mockery.

[49] His Lordship, Viscount Sankey LC in *Woolmington v Director of Public Prosecutions* [1935] AC 462 at p 481; [1935] All ER Rep 1 at p 8 to be that 'Throughout the web of the English Criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt'.

[50] The *Woolmington* principle was, however, subject to Parliament legislating to the contrary. It is a fact that the Legislature has frequently and in an arbitrary and indiscriminate manner made inroads on the basic presumption of innocence.

[51] In 1972 a most distinguished Criminal Law Revision Committee had observed that 'we are strongly of the opinion that, both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be

A evidential only': *Eleventh Report of the Criminal Law Revision Committee: Evidence (General)* (Cmnd 4991 (1972)), para 140. Nevertheless, the process of enacting legal reverse burden of proof provisions continued apace.

B **[52]** The Privy Council discussed the reverse onus clause in *Lim Chin Aik v Regina* [1963] 1 MLJ 50 where the facts were that the appellant who was born in China about the year 1900, after living in Singapore with his wives and children, left Singapore in 1954 in circumstances apparently of some suspicion. At the beginning of 1955, he was living in the Federation of Malaya and he visited his family daily at Singapore, returning each night to the C Federation. On 28 May 1959, the Minister, acting under s 9 of the Immigration Ordinance (Cap 102, 1955 Ed) ('the Ordinance'), made an order prohibiting the appellant from entering Singapore, but there was no evidence at the trial from which it could properly be inferred that the order had in fact come to the notice or attention of the appellant. At some time, more than ten D days before 29 June 1959, the appellant began to live in Singapore. On 29 June, the appellant was arrested and was duly charged under s 6(2) of the Ordinance and convicted on 27 August 1959 by the magistrate. On the High Court dismissing his appeal without stating any reasons, he appealed by special leave to the Board. It was argued for the appellant that: (a) the absence of any E evidence of the guilty intent of the appellant was fatal to the validity of his conviction; (b) if *mens rea* was an essential ingredient of an offence under s 6(3) of the Ordinance, then the onus of proof of its existence lay upon the prosecution.

F **[53]** Lord Evershed (speaking for the Privy Council) said:

> the presumption is that mens rea or evil intention or knowledge of the wrongfulness of the act is an essential ingredient of every offence but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals and both must be considered.

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[54] The Lord Chief Justice, Lord Goddard, in the case of *Brend v Wood* (1946) 62 TLR 462 said:

H > It is in my opinion of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.

I **[55]** The Privy Council case of *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 LNS 181 was quoted to state that the phrase 'in accordance w ith law' had been construed to mean 'in accordance with a system of law that does not flout the fundamental rules which include the rules governing the burden of proof in a criminal case and

the rules of natural justice which afford protection for the individual in the enjoyment of his fundamental liberties' (at p 71).

[56] Having discussed the authorities above, I find that the public prosecutor is not relieved of his burden at all. What happened is, by giving some emphasis on the child evidence where a child is the victim (and not in any other case).

[57] Hence question (b) and (c) are not at all constitutional issues but rather jurisprudential issues and the application of legal principles in the rule of harmonious construction. I too, hold the opinion that questions (b) and (c) are *both on principle and for the sake of clarity and convenience in practice, burdens should be evidential only. It does not relieve the prosecution of their duty under* s 101 of the Evidence Act 1950.

[58] Question (a) which is: 'whether s 18 of the Sexual Offences Against Children 2017 empowers a trial judge to convict an accused person based on uncorroborated evidence of a child contrary to arts 5 and 8 Federal Constitution'.

[59] Article 5:

> 5 Liberty of the person
>
> (1) *No person shall be deprived of his life or personal liberty save in accordance with law.*
>
> (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.
>
> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
>
> (4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:
>
> Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day:
>
> Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words 'without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)' the words 'within fourteen days':

A And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.

(5) *Clauses (3) and (4) do not apply to an enemy alien*.

B **[60]** Article 8 reads as follows:

8 Equality

(1) *All persons are equal before the law and entitled to the equal protection of the law.*

C (2) *Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.*

D (3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

(4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

E (5) This Article does not invalidate or prohibit —

(a) any provision regulating personal law;

(b) any provisions or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion;

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(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

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(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

H (e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision restricting enlistment in the Malay Regiment to Malays.

I **[61]** There are a few matters that must be mentioned when any party make an application to strike down a piece of legislation.

[62] These are:

Firstly, It is established law that the proper approach to interpreting the Constitution is that there is always a presumption in favour of constitutionality of an enactment and the burden is on him who attacks the enactment to show that there has been a clear transgression of the constitutional principles (see *Public Prosecutor v Su Liang Yu* [1976] 1 LNS 113; [1978] 2 MLJ 79; *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389; [2006] 2 CLJ 701; *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105).

[63] In constitutional law, the presumption of constitutionality is the legal principle that the judiciary should presume statutes enacted by the Legislature to be constitutional, unless the law is clearly unconstitutional or a fundamental right is implicated (Gillian E Metzger and Trevor W Morrison, 'The Presumption of Constitutionality and the Individual Mandate' in The Health Care Case: The Supreme Court's Decision and Its Implications (eds Nathaniel Persily, Gillian E Metzger & Trevor W Morrison: Oxford University Press, 2013, p 136).

[64] The same principle is applicable in Singapore (Jack Tsen-Ta Lee, 'Rethinking the Presumption of Constitutionality' in Constitutional Interpretation in Singapore: Theory and Practice (ed Jaclyn L Neo: Routledge, 2017).

[65] This principle was also clarified by the Court of Appeal in the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771 where His Lordship, Court of Appeal Justice Gopal Sri Ram quoted at pp 285–286 (MLJ) the following excerpt from the case of *Re Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act* AIR 1939 FC 1 which is as follows:

> *Although we are to interpret the words of the constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting, — to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be. Especially is this true of a federal constitution, with its nice balance of jurisdiction. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legalor constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors.* (Emphasis added.)

[66] Secondly, in the case of *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*, the Federal Court pointed out the same principle at p 103 where the court quoted the case of *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; [1976] 1 LNS 180, His Lordship Federal Court

Justice Mohammad Dzaiddin said as follows:

> It should be borne in mind that there is a strong presumption of the constitutional validity of an enactment or the impugned section with the burden of proof on whoever alleges otherwise.

[67] Thirdly, it must be presumed that the legislature understands and correctly appreciates the need of its own people — (see *Public Prosecutor v Su Liang Yu* [1976] 1 LNS 113; [1978] 2 MLJ 79; *Yii Hung Siong v Public Prosecutor* [2005] 6 MLJ 432; [2005] 4 CLJ 158; *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566; [1994] 1 LNS 208; *Said Mir Bahrami v Pengarah Penjara Sungai Buloh, Selangor* [2013] 2 MLJ 478; [2013] 5 CLJ 447).

[68] On the issue of separation of powers, the Federal Court in the same case (*Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105) overruled the decision of the Court of Appeal in declaring the cancellation of the appellant's entry permit as null and void and of no effect.

[69] The Federal Court in fact held that the question before the court was whether the statutory provisions contained in s 59A of the Immigration Act 1963 can preclude the court from exercising its powers of judicial review over the decision of public decision makers.

[70] The Court of Appeal held that s 59A could not and did not preclude the High Court from exercising its powers of judicial review to examine the validity of the exercise of administrative powers conferred by the act both on substantive as well as procedural grounds.

[71] Their reasons for this conclusion then were set out and it involved the Court of Appeal's reasoning that Malaysia has a written constitution which has been fashioned in language that upholds the Rule of Law.

[72] The Court of Appeal then went on to speak of the deletion of art 121(1) of the Federal Constitution stating that its deletion did not have the effect of taking away the judicial power from the High Courts. It was in this context that the statement was made that the Federal Constitution preserves the separation of powers between the three arms of government and evinces no intention that the judicial power of the Federation shall be passed to or shared with the Executive or the Legislative.

[73] At this point, we wish to highlight that the order sought from the High Court and which related to the appeal to the Court of Appeal was a certiorari seeking to quash the Sabah Director of Immigration (*Pengarah Imigresen Negeri*

Sabah)'s act of cancelling the entry pass.

[74] At *NO* point, however, was the Court of Appeal in the case of *Sugumar Balakrishnan* making a decision to strike down s 59A on the basis that it was in conflict with the doctrine of separation of powers.

[75] In any event, the Federal Court expressly overruled the Court of Appeal decision on the ability of the judiciary to examine the decision under s 59A stating as follows:

> In our view Parliament having excluded judicial review under the Act, it is not permissible for our courts to intervene and disturb a statutorily unreviewable decision on the basis of a new amorphous and wide ranging concept of substantive unfairness as a separate ground of judicial review which even the English courts in common law have not recognised.

[76] In *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341 where the application was made to declare s 97(2) of the Child Act 2001 to be unconstitutional on the basis of being in violation of the doctrine of separation of powers contained in the Federal Constitution.

[77] The Federal Court was abundantly clear in its reasoning that a provision of the law cannot be struck out as unconstitutional if it is not inconsistent with the Constitution even though it may be inconsistent with the doctrine.

[78] Our Constitution does have the features of separation of powers and at the same time contains features which do not strictly comply with the doctrine. What are these peculiarities ie where the Constitution itself does not comply with separation of powers strictly? This was set out in His Lordship President of the Court of Appeal Tan Sri Abdul Hamid Mohamad's judgment itself at para 16 of p 16:

> The Yang di-Pertuan Agong in whom the executive authority of the Federation is vested (Article 39) is the Supreme Commander of the armed forces of the Federation (Article 41).
>
> Parliament consists of the Yang di-Pertuan Agong, the Dewan Negara and Dewan Rakyat (Article 44).
>
> While members of the Dewan Rakyat are directly elected, members of the Dewan Negara may be elected by the Legislative Assembly of the States or appointed by the Yang di-Pertuan Agong (Article 45(1) and Seventh Schedule).
>
> Judges, including the Chief Justice are appointed by the Yang di-Pertuan Agong. Even the principal registry of the High Court of Sabah and Sarawak is determined by the Yang di-Pertuan Agong (Article 121(1)(b)). On top of all that, the Yang di-Pertuan Agong, unlike the British Monarch, is elected by the Conference of Rulers for a fixed period of five years.

[79] It was upon this careful assessment that His Lordship Abdul Hamid Mohamad PCA then reasoned that although the doctrine of separation of powers had influenced the framers of the Malaysian Constitution, the doctrine is not a provision of the Malaysian Constitution.

[80] It is the provision of the Constitution that matters, His Lordship clearly stated.

[81] We would add that in his reasoning, His Lordship also used the analogy of democracy which, like separation of powers had influenced the framers of the Constitution and this is pertinent to note.

[82] His Lordship then stated that although the Constitution provides for elections, which is a democratic process, that does not make democracy a provision of our Constitution.

[83] This reasoning should be paid particular attention as His Lordship explained why a law should never be struck down on the basis that it is at variance with a doctrine. Hence, the following excerpt from His Lordship's judgment:

> In other words we have our own model. Our Constitution does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly, no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine. The doctrine is not a provision of the Malaysian Constitution even though no doubt, it had influenced the framers of the Malaysian Constitution, just like democracy. The Constitution provides for elections, which is a democratic process.
>
> That does not make democracy a provision of the Constitution in that where any law is undemocratic it is inconsistent with the Constitution and therefore void.

[84] Fourthly, in *Yii Hung Siong v Public Prosecutor* [2005] 6 MLJ 432; [2005] 4 CLJ 158, the court at p 439 (MLJ); p 164 (CLJ) stated as follows:

> There is always a presumption that Parliament understands and correctly appreciates the needs of its people, that its laws are directed to problems made manifest by experience and that its discrimination are based on adequate grounds (*Ram Prasad v State of Bihar* AIR 1953 SC 215). (Emphasis added.)

[85] Fifth, and moreover, the Supreme Court in *Public Prosecutor v Pung Chen Choon*, at pp 576–577 had this to say:

It is clear law that there is a presumption — perhaps even a strong presumption — of the constitutional validity of the impugned section and so the burden of proof lies on the party seeking to establish the contrary. Secondly, we endorse the proposition that, where a law purports to authorize restrictions in language wide enough to cover restrictions both within and without the permissible limits of legislative action, it cannot be upheld, not even so far as it is applied within the constitutional limits, for it is impossible to apply the principle of severability. But we hasten to add that we adhere to the principle enunciated by the Supreme Court of India in *Kader Nath Singh v Bihar*, that *it is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution and another interpretation would render them unconstitutional, the court would lean in favour of the former construction.* (Emphasis added.)

[86] Sixth, this principle was also clarified by the Court of Appeal in the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771 where His Lordship Court of Appeal Justice Gopal Sri Ram (as he then was) quoted at pp 285–286 the following excerpt from the case of *Re Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act* AIR 1939 FC 1 which is as follows:

Although we are to interpret the words of the constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting — to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be. Especially is this true of a federal constitution, with its nice balance of jurisdiction. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. (Emphasis added.)

[87] Seventh, when there are differing constructions which are possible, the judge must choose the construction which in his judgment best meets the purpose of the enactment — *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273.

[88] Eighth, furthermore, when the court is faced with the issue of constitutionality of a provision of a statute, the court should be slow in striking down the impugned provision for being unconstitutional. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain — this is clearly enunciated by the Federal Court in the case of *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766. This demonstrates the apex court's position on the approach to be taken when the issue of constitutional challenge is before the courts.

[89] Ninth in construing the Federal Constitution, another equally important principle that should be borne in mind, in that the rule of harmonious construction should also be applied — (see *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70; [1979] 1 LNS 67; *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266; [1999] 1 CLJ 481; *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921; *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)* [2016] 1 MLJ 153; [2015] 8 CLJ 621).

[90] The Rule of Harmonious Construction was discussed in *Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govindasamy* [1982] 2 MLJ 232 The Federal Court reconciled two extreme possibilities ie between s 84(4) oustering the judicial power and s 84(4) of the Act that has to be read together with s 90 and using the Rule for Harmonious Construction, finds a middle path. It is to be noted that when there are two possible interpretations, one is incline towards unconstitutionality of the impugned law and another bends towards the constitutionality of that impugned law, the court must choose the latter over the former.

[91] The Federal Court has this to say:

> (c) Civil Court's Jurisdiction:
>
> Before we conclude this judgment we must deal with the submission of counsel for the appellants on the second ground of appeal. It was submitted to us that the learned trial judge erred in law in failing to hold that the question as to whether the respondent was an employee within the meaning of the Act ought to be decided by the Social Security Appellate Board and not by a Civil Court.
>
> The Board is established under s 83 of the Act with power to decide a number of matters enumerated in sub-ss (1) and (2) of s 84. The relevant matters for the purpose of this appeal are those contained in paras (a) and (b) of s 84(1), namely:
>
> (a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution; or
>
> (b) the rate of wages of an employee for the purposes of this Act; or Subsection (4) of section 84 provides that no Civil Court shall have jurisdiction to decide such matters. This subsection is enacted in the following words:
>
> (4) No Civil Court shall have jurisdiction to decide or deal with any question or dispute mentioned in sub-sections (1) and (2) or to adjudicate on any ability which by or under this Act is to be decided by the Board.
>
> However, as the Board in common with other administrative tribunals is not competent to make a final determination on any legal question, its decision is reviewable by the High Court either by way of reference or submission thereto or by way of an appeal. Such review is limited to points of law only. These provisions are to be found in ss 90 and 91 which enact as follows:

> 90 A Board may submit any question of law for the decision of the High Court and if it does so shall decide the question pending before it in accordance with such decision.
>
> (1) Save as expressly provided in this section, no appeal shall lie from an order of the appellate boards set by up or under this Act;
>
> (2) An appeal shall lie to the High Court from an order of an appellate board set up by or under this Act if it involves a substantial question of law;
>
> (3) The period of 'imitation of an appeal under this section shall be sixty days from tile date tile order is made.

The effect of the appellants' contention on the second ground of appeal, therefore, is that neither the learned trial judge nor do we have the jurisdiction to determine in this appeal the question as to whether the respondent was an employee or not; and that only after the Board has so determined it would the learned trial judge and we either by way of a submission by the Board or by way of an appeal have the necessary jurisdiction to decide the question and that even here we are limited to decide only upon matters involving a substantial question of law.

If this submission is right it means that the learned trial judge should not have decided the question as to whether or not the respondent was an employee at all. Yet the decision on this issue is crucial to the court's determination on the applicability or otherwise of s 31 of the Act which is part of the appellants' case. Does it mean that the court has also no jurisdiction to decided on the interpretation of this section? Or does it mean that the court, when confronted by the question during the course of determining the applicability or otherwise of s 31 of the Act, must adjourn the hearing and refer the question to the Board?

An examination of the records of appeal clearly reveals that such a course of conduct was never taken by the appellants or their counsel. The applicability or otherwise of s 31 has never been part of the respondent's case as his case simply rests on common law negligence. The appellants at first filed their statement of defence by simply denying negligence and it was only in their amended statement of defence filed on September 24, 1980 by their present solicitors that an alternative defence under s 31 of the Act was introduced. Paragraph 7A of the amended statement of defence states:

> 7A. Further or in the alternative the Defendants contend that the Plaintiff is an insured person within the provisions of the Employees' Social Security Act 1969 and by virtue of section 31 of the said Act is not entitled to receive or recover from the Defendant damages under any law for the time being in force in respect of any employment injury sustained as an employee under the said Act.

Further, there is nothing in the amended statement of defence to show that the appellants objected to the jurisdiction of the High Court to determine the issue and in particular the question as to whether or not the respondent was an employee. It was only during the course of making his submission before the learned trial judge that counsel for the appellants raised the issue of jurisdiction by quoting to him ss 84, 90 and 91 of the Act. Such submission prompted counsel for the respondent to state in his reply:

A Nothing in SOCSO Act to exclude jurisdiction of court in SOCSO matters.

From the review of the records it is clear that the issue of the civil court's lack of jurisdiction was never pleaded and that it was raised for the first time only at the last stage of the trial. No application was made by the appellants to amend the defence, nor did they take any action to have the hearing adjourned so that the question on
B employee could be referred to the Board for its decision. Thus we are of the view the learned trial judge was right in not taking counsel's submission on this issue into consideration as it was made without a basis in that it was not supported by their own pleadings. In this connection it is relevant for us to quote the speech of Lord Edmund Davies in *Farrell v Secretary Of State For Defence* [1980] 1 All ER
C 166, 173. Of pleadings His Lordship said:

> For the Primary purpose of pleadings remains and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps
D to deal with it.

Quite apart from this technical objection counsel's submission is also untenable because the issue which the learned trial judge was called upon to decide is really on the interpretation of s 31 of the Act and not on the question of the respondent being an employee within the meaning of the Act, although such question is crucial to the
E main issue. Section 84 of the Act does not enact that the applicability or otherwise of s 31 lies with the Board. Indeed it will be unconstitutional as it is contrary to art 121 of the Federal Constitution if the Act were to arrogate the interpretation of this section to the Board. The determination of a preliminary question as to whether or not the respondent was an employee is not only plainly a legal question but also an
F integral part of the interpretation of s 31 which is legally and constitutionally not within the competence of the Board to decide. Such being the case, we therefore cannot see how the learned trial judge could be held to have erred in deciding the issue.

Thus for the reasons given in the foregoing paragraphs we dismiss this appeal with costs. Deposit to respondent against taxed costs.
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[92] In our instant case, the complaint is that a child is treated differently from adults and hence this discrimination in the reception of evidence or a contradiction of position between s 18 of the Sexual Offence against Children
H Act 2017 and s 133A of the Evidence Act.

[93] I shall deal with the discrimination issue because the issue of contradiction of position between s 18 of the Sexual Offence against Children Act 2017 and s 133A of the Evidence Act has been dealt with earlier in this
I judgment.

[94] Let us begin by looking at art 5 and compare it with s 25(3) of the South African Constitution to appreciate the length and breath of our constitutional provision.

[95] Article 5(1) reads as follows: '(1) No person shall be deprived of his life or personal liberty save in accordance with law' while s 25(3)(c) of the Constitution of South Africa expressly provides that: 'Every accused person shall have the right to a fair trial, which shall include the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial'.

[96] Even a cursory look at the wordings shows a vast difference in the meaning.

[97] The Federal Court was posed with the meaning of art 5(1) in the case of *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105, on the powers of legislation to take away constitutional guarantees and the court ruled that:

> It is clear from the authorities that the constitutional rights as guaranteed under art 5(1) of the Federal Constitution can be taken away in accordance with law. Hence, s 59 of the Act, which removes the audi alterem partem rule, which was duly enacted by Parliament is valid and constitutional.

[98] In *Sugumar*, an important doctrine such as *audi alteram partem* could be removed, since it is not enumerated and not expressly provided for by the Federal Constitution.

[99] Obviously, this cannot be the case in South Africa as shown by the case of *S v Coetzee and Others* [1997] ZACC 2, and when analysed in the proper light, we can see that in both countries, constitutional rights that are guaranteed are those expressly provided for and any law ultra vires to these express provisions will be null and void.

[100] The case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 where the following excerpt of His Lordship Justice Raja Azlan Shah (as His Royal Highness then was) is relevant:

> *Whatever may be said of otherc onstitutions, they are ultimately of little assistance to us because our constitutions now stands in its own right and it is in the end the wording of our constitution itself that is to be interpreted and applied and this wording 'can never be overridden by the extraneous principles of other constitutions' — see Adegbenro v Akintola & Anor. Each country frames its constitution according to its genius and for the good of its own society. We look at other constitutions to learn from their experiences and from a desire to see how their progress and well- being is ensured by their fundamental law.*

[101] This is the wisdom underlying *Loh Kooi Choon* which was restored in its place by *Said Mir Bahrami v Pengarah Penjara Sungai Buloh, Selangor* [2013] 2 MLJ 478; [2013] 5 CLJ 447 where the Federal Court reiterated the *Loh Kooi*

Choon particularly when speaking of 'harsh or unjust law'.

[102] In the case of *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341, His Lordship, the President of the Court of Appeal Tan Sri Abdul Hamid Mohamad (as he then was) in similarly said:

> *So, in determining the constitutionality or otherwise of a statute under our constitution by the court of law, it is the provision of our constitution that matters, not a political theory by some thinkers.*

[103] These two learned judgments draw attention to one important point — it is the wording of our Constitution that matters. In this case, the wording of our Constitution is clear in that there is no mention of the presumption of innocence. As such, the presumption of innocence remain to this day (borrowing the words of Lord Diplock) a 'rule of evidence'.

[104] In the case of *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285; [2008] 1 CLJ 521 the Federal Court refused to accept the arguments of the Appellant to read into the Federal Constitution, words which did not exist therein. In this case, a challenge was made to the appointment of Dr Badariah Sahamid as a judicial commissioner on the basis that she was not a practicing advocate for a period of ten years prior to her appointment. The relevant article in the Federal Constitution namely art 123 provides as follows:

> A person is qualified for appointment under Article 122B as a judge of the Federal Court, as a judge of the Court of Appeal or as a judge of any of the High Court if:
>
> (a) he is a citizen; and
>
> (b) for the ten years preceding his appointment he has been an advocate of those courts or any of them or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one of sometimes another.

[105] In rejecting this argument, His Lordship Federal Court Justice Nik Hashim stated at pp 545–545 as follows:

> *Therefore, taking the above approach to the case before us, the interpretation as requiring only an advocate and solicitor who has been in practice (in possession of a practicing certificate) preceding the appointment before he could be qualified as a JC or a judge of the High Court, would amount to reading words which are not in art 123 of the FC, and surely this is a wrong thing to do for the term 'advocate' in the FC appears to have the same meaning as 'advocate' and 'advocate and solicitor' under s 66 of the Interpretation Acts 1948 and 1976 (Act 388) (Part II) to mean an advocate and solicitor of the High Court, and under s 3 of the Legal Profession Act 1976 (Act 166) the phrase 'advocate and solicitor' means an advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act.*

[106] The lack of express mention in the Constitution is a very important factor that has been taken into consideration by courts in deciding whether to incorporate international norms into the Constitution of a country. In the Singapore case of *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489, the Court of Appeal refused to read into the Singapore constitution a prohibition against inhuman punishment saying that such a prohibition was not expressly provided for. Chief Justice Chan Sek Keong's observations on this issue are set out below:

> *We agree that domestic law, including the Singapore Constitution, should, as far as possible, be interpreted consistently with Singapore's international legal obligations. There are, however, inherent limits on the extent to which our courts may refer to international human rights norms for this purpose. For instance, reference to international human rights norms would not be appropriate where the express wording of the Singapore Constitution is not amenable to the incorporation of the international norms in question, or where Singapore's constitutional history is such as to militate against the incorporation of those international norms (in this regard, see further [61]–[72] below). In such circumstances, in order for our courts to give full effect to international human rights norms, it would be necessary for Parliament to first enact new laws (as the drafters of the UDHR hoped States would do) or even amend the Singapore Constitution to expressly provide for rights which have not already been incorporated therein. Both of these measures are, as Lord Bingham observed in Reyes at [28] (reproduced in the preceding paragraph), well within the prerogative of a sovereign State. In short, the point which we seek to make is this: where our courts have reached the limits on the extent to which they may properly have regard to international human rights norms in interpreting the Singapore Constitution, it would not be appropriate for them to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions.*

[107] In *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341, the Federal Court has this to say:

> Regarding the issue of determining the constitutionality of a statute, Abdul Hamid Mohamad PCA (as he then was) in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 at p 17; [2007] 6 CLJ 341 at p 355 had this to say:
>
> > *So, in determining the constitutionally or otherwise of a statute under our constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers.* As Raja Azlan Shah FJ (as his Royal Highness then was) quoting Frankfurter J said in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 *(Federal Court) said: 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.*

[108] References made to two cases as authorities to support that the impugned law violated the constitutional rights are *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 and *Maneka Gandhi v Union of India* 1978 AIR 597, the former being a case where His Lordship Court of Appeal Justice Gopal Sri Ram (speaking for the Federal Court) held that it was

A a duty of the court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under the Constitution and the latter being a case where the judge had held that to be a fundamental right it is not necessary that the right be specifically mentioned in a particular article. This involve a situation where the accused had been deprived of his right to make a
B submission of no case at the close of the prosecution case. This was not a case involving a challenge to legislation but rather the deprivation of that right to submit before the trial judge. In short, it is a challenge on judicial practice in a trial. Such deprivation was taken to be a deprivation of the *audi alteram partem* rule.
C

[109] This was in tandem the judgment of His Lordship, the Chief Justice (Borneo) Lee Hun Hoe in *Re Tan Boon Liat @ Allen & Anor et al* [1977] 2 MLJ 108 where the learned Chief Justice held that:

D > ... in accordance with law in art 5 of our Constitution is wide enough to cover procedure as well. Here the point is not whether the question of procedure is more important under one Constitution than under the other. If the expression 'in accordance with law' were to be construed as to exclude procedure then it would make nonsense of art 5.

E

[110] What the impugned law is about is also procedural in nature and comes within the umbrella of 'in accordance with law' of art 5(1) of the Federal Constitution.

F

[111] Similarly the case of *Maneka Gandhi v Union of India* 1978 AIR 597, involved a challenge to an executive decision impounding the petitioner's passport. At no point in time, was there any challenge to the constitutionality of any law but rather an executive action that violated the rights of the
G individuals.

[112] Further to this, *Maneka Gandhi* reaffirms the concept of judicial review of an executive action bearing in mind, executive action is decided by those in power (with or without consultation) whereas the enacting of a law is a
H legislative process that involves many processes that invites check-and-balance on the onset.

[113] These legislative process are set out in arts 73–79 and 159 Federal Constitution.

I

[114] These are part and parcel of the basic structures of the Constitution as stated in the case of *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70; [1979] 1 LNS 67, where the Federal Court opined that 'Parliament may amend the Constitution in any way they think fit, provided that they comply

with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself'.

[115] There has been much ado about the basic structure of the Constitution and without going into the arguments against this basic structure issue, there must be a basic structure of Malaysia ad distinct to other countries.

[116] If at all, this argument that basic structure is to stand, surely the basic structure of the Indian Constitution such as republican system, absence of the religion of federation, presidential system cannot be of any application to Malaysia. In my view, (if at all) the basic structure of Malaysia are:

(a) supremacy of the Constitution;

(b) fundamental liberties;

(c) constitutional monarchy including the Yang di-Pertuan Agong and the Conference of Rulers;

(d) that the religion of the Federation shall be Islam but that other religions may be practised in peace and harmony;

(e) separation of the powers of the three branches of government; and

(f) the federal character of the Constitution;

(g) the special rights of the Malays and the natives of Sabah and Sarawak and the legitimate rights of other races;

(h) federal-state relationship in both legislative and executive spheres;

(i) preventive laws;

(j) emergency powers;

(k) amendments to the laws must be made in compliance art 159; and

(l) Parliamentary democracy.

[117] To deprive the Legislature of such powers as enacting the impugned laws tantamount to attacking the very basic structure of the Constitution. However, this altogether different in attacking an executive action as some are not enumerated in the Federal Constitution and hence open to abuses.

[118] We would further highlight that despite the 2009 Federal Court decision in *Lee Kwan Woh* quashing the conviction on the basis that it was a constitutionally guaranteed right of an accused to a fair trial to make a submission of no case at the close of the prosecution case, the Federal Court in 2010 in the case of *Diana Nelson Tanoja v Public Prosecutor* [2010] 2 MLJ 573 has held that it is not mandatory for the trial judge to hear submission from

counsel before giving his decision. The Federal Court in *Diana Nelson* held:

> [37] The word 'may' indicates discretion. Therefore it could be seen that submission at the end of the defence case is discretionary and not mandatory. Therefore the learned trial judge could if he wanted to, decide without having the need to hear submission from defence counsel. Submission is not evidence and hence the judgment is not defective. If the law categorically states that it is not mandatory for counsel to make submission, we can see no reason why it is mandatory for the learned trial judge to hear submission. What, if learned counsel chooses not to make submission? Is the learned trial judge still obliged to call upon learned counsel to make submission? If indeed the law intends that the learned trial judge should hear submission than it would say so in no uncertain terms.
>
> ...
>
> [39] *We therefore say that there is no basis for learned counsel for the appellant to allege that the learned trial judge has prejudged the matter even before submission is heard and tha t this ha s prejudiced the rights of the appellant.*

[119] Hence, we say that the effect of the decision of the Federal Court in *Lee Kwan Woh* has been reversed by the decision of the apex court in *Diana Nelson*. The court in *Diana Nelson* had refused to quash the conviction and the basis on which it refused to do so was clear — the law in question, namely s 181 of the CPC did not make it mandatory for such a submission to be made by counsel or heard by the judge.

[120] If the apex court in *Diana Nelson* refused to quash a conviction on the basis of what was set out in the law, we would therefore say that the principles on which the decision in *Lee Kwan Woh* were made should be regarded with caution by this honourable court. The net effect of the decision in *Diana Nelson* is that the apex court in a later case has decided not to quash a conviction and has arrived at this conclusion on the basis of what is in the black letter of the law.

[121] Based on this reasoning therefore, we say that there is no basis to hold s 18 of the Sexual Offences Against Children Act 2017 as unconstitutional as it is not in violation of any express, enumerated right in the Federal Constitution.

[122] The wordings of the Federal Constitution are abundantly clear in that there is no such presumption of innocence which is given express mention therein.

[123] For the sake of the arguments, even if one were to read the constitution 'prismatically' and broadly so as to encompass non textual and non-enumerated rights, this should not be done so as to declare a law validly passed by Parliament to be ultra vires the Constitution where the constitution itself is devoid of reference to such a right.

[124] This, would lead to not only uncertainty in the application of the law but also absurdity, as it would lead to the result where laws can be overturned, not by testing those laws against the express Constitutional safeguards but by reading into the Constitution, words that do not exist. The need to give effect to the will of Parliament is vital and in this regard it is imperative for this court to consider the following exhortation of the Federal Court in the case of *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 as follows:

> Thirdly, if the law-maker so amends the law, to paraphrase the words of Lord Diplock at p 541 in *Duport Steels Ltd v Sirs* [1980] 1 All ER 529, *the role of the judiciary is confined to ascertaining from the words that the law-maker has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the words is plain and unambiguous it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral*; or to paraphrase the words of Lord Scarman at p 551 in the same case, *in the field of statute law the judge must be obedient to the will of the law-maker as expressed in its enactments, the judge has power of choice where differing constructions are possible, but he must choose the construction which in his judgment best meets the legislative purpose of the enactment. Even if the result be unjust but inevitable, he must not deny the statute; unpalatable statute law may not be disregarded or rejected, simply because it is unpala table ; the judge's duty is to interpret and apply it.*

[125] In other words, in interpretation, one must keep in mind the very strong presumption of constitutionality as laid down in so many authorities from the highest level which in *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566; [1994] 1 LNS 208, the then Supreme Court, opined:

> It is clear law that there is a strong presumptio n of the constitutional validity of the impugned section and so the burden of proof lies on the party seeking to establish the contrary ...

[126] It must be appreciated that an important precept in that where differing constructions are possible, the judge must choose a construction which best meets the legislative purpose of the enactment as clearly stated in the case of *Sihabduin* as follows:

> *In the field of statute law the judge must be obedient to the will of the law-maker as expressed in its enactments, the judge has power of choice where differing constructions are possible, but he must choose the construction which in his judgment best meets the legislative purpose of the enactment.*

[127] The reason is obvious, the separation of powers (which is part of the basic structure of the Constitution) must be given the highest respect.

[128] The interpretation of the Constitution itself *MUST* be equally strict in adhering to the intentions of the framers of the Constitution.

[129] Encroaching into the realm of legislation (such as striking down a law which has been properly passed by Parliament) would tantamount to judicial legislation.

[130] The case of *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566; [1994] 1 LNS 208 clearly spelt out that:

> ... However, it is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the court would lean in favour of the former construction ...

[131] Regarding the issue of determining the constitutionality of a statue, His Lordship the President of the Court of Appeal Abdul Hamid Mohamad (as he then was) in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 at p 17; [2007] 6 CLJ 341 had this to say:

> *So, in determining the constitutionally or otherwise of a statue under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers.* As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Frankfurter J said in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC) said: *The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.*

[132] The words of Justice Jeevan Reddy in *State of Bihar & Ors Etc v Bihar Distillery Ltd Etc* AIR 1997 SC 1511, which as quoted by His Lordship Court of Appeal Gopal Sri Ram (as he then was) in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169 which reads:

> *The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain.*

[133] Now, coming to art 8, the issue of discrimination, it is obvious that s 18 of the Sexual Offences Against Children Act 2017 is focused on:

(a) children;

(b) the victim is a child;

(c) the weight of evidence is to be treated in the like manner of an adult evidence, when and if the victim is a child; and

(d) the qualification of s 133A of the Evidence Act 1950 is caveated when the witness is a child who is the victim in the case.

[134] The recent Federal Court decision in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236; [2021] 6 CLJ 471

where it was held that:

> The second type of discrimination which art 8(1) allows, based on decided and settled cases is the concept of reasonable classification (see *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; [1976] 1 LNS 180, at p 117 and generally *Mohamed Sidin v Public Prosecutor* [1967] 1 MLJ 106; [1966] 1 LNS 107). Discrimination is unlawful and in violation of art 8(1) if it is not founded on an intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question.

[135] The phrase 'intelligible differentia' means a difference which is capable of being understood. It is a factor that distinguishes or in different state or class from another which is capable of being understood.

[136] This expression of intelligible differentia and its application has been explained in the case of *Public Prosecutor v Harmenderpall Singh a/l Jagara Singh* [2007] 3 MLJ 433; [2007] 2 CLJ 577 where it was held as follows:

> [61] *Going by the Oxford English Dictionary, 'intelligible' means: capable of understanding (not by senses) that may be apprehended by intellect, and 'differentia' means: the attribute by which a species is distinguished from all other species of the same genus; a distinguishing mark or character. In this instance, the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may therefore be founded on a different basis, namely geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act. The classification should never be arbitrary, artificial or evasive. It must rest always upon real and substantive distinction bearing a reasonable and just relation to the thing in respect to which the classification is made for otherwise the classification made would be without any reasonable basis* — Mukherjee J in *Anwar Ali Sarkar*'s case 1952 AIR 75 and quoted IN *Public Prosecutor v Su Liang Yu* [1976] 1 LNS 113; [1978] 2 MLJ 79 at p 130. (Emphasis added.)

[137] This doctrine of classification is further explained by the Lord President Tun Suffian in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155; [1976] 1 LNS 19 (FC) as follows:

> 7. In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced above from the judgment in SHRI RAM KRISHNA DALMIA, provided that:
>
> (i) *the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and*
>
> (ii) *the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.*

A The Solicitor-General submits that if the Indian doctrine of classification is to be accepted by our courts, which he argues has not been done, it may be accepted subject to the modification that the courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the legislature. In our opinion the doctrine of classification should be accepted by our
B courts, subject to what we said in para 6 above. We adhere to what was said in *Public Prosecutor v Khong Teng Khen* at p 170.

[138] Recapitulating the meaning of intelligible differentia which are encapsulated as follows:

C

(a) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

D (b) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

E

[139] There must be something within the framework of s 18 of the Sexual Offences against the provisions of the Constitution before it can be declared unconstitutional.

F **[140]** Measuring one provision of a federal law against another provision of another federal law is not the manner by which a legislation may be declared unconstitutional.

CONCLUSION

G

[141] Keeping in mind, the locus classicus of *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 at pp 576–577; [1994] 1 LNS 208 had this to say:

H It is clear law that there is a presumption — perhaps even a strong presumption — of the constitutional validity of the impugned section and so the burden of proof lies on the party seeking to establish the contrary. Secondly, we endorse the proposition that, where a law purports to authorize restrictions in language wide enough to cover restrictions both within and without the permissible limits of legislative action, it cannot be upheld, not even so far as it is applied within the constitutional limits, for it is impossible to apply the principle of severability. But we hasten to add
I that we adhere to the principle enunciated by the Supreme Court of India in *Kader Nath Singh v Bihar 16, that it is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution and another interpretation would render them unconstitutional, the court would lean in favour of the former construction.*

[142] It is not lost on this court the following principles of law:

(a) there is a presumption — perhaps even a strong presumption — of the constitutional validity of the impugned section;

(b) the burden of proof lies on the party seeking to establish the contrary;

(c) where a law purports to authorise restrictions in language wide enough to cover restrictions both within and without the permissible limits of legislative action, it cannot be upheld, not even so far as it is applied within the constitutional limits;

(d) it is impossible to apply the principle of severability; and

(e) if certain provisions of law construed in one way would make them consistent with the Constitution and another interpretation would render them unconstitutional, the court would lean in favour of the former construction.

[143] I have perused over the cause papers, the written submissions as well as heard the learned counsel as well as the learned deputy.

[144] Learned defence counsel invited this court to struck down s 18 of the Sexual Offences Against Children Act 2017, which I regret to answer that I must respectfully decline.

[145] I find no error on the part of the learned sessions court judge that warranted appellate intervention.

[146] I dismiss these three appeals, uphold the decisions of the learned sessions court judge and direct this case to be remitted immediately to the sessions court for the continuation of the trial until its final conclusion.

Appeals dismissed; decisions of SCJ upheld; case remitted to SC for continuation of trial until its final conclusion.

Reported by Dzulqarnain Ab Fatar